

How is a Judicial Decision Made in Parental Religious Disputes?

An analysis of determining factors in Dutch and European Court of Human Rights case law

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1. Introduction: setting the stage

In the last few decades courts have been confronted with a variety of cases concerning the effects of the religious views and practices of parents on their children. In the Netherlands family law courts have had to decide on the impact of a strict religious upbringing on the well-being of the child, on religious rituals like circumcision and baptism, on the choice between secular or religious schooling and on the exposure of children to (non-)religious practices, when dealing with the contact arrangements. The case law of the European Court of Human Rights (ECtHR) shows that family law courts in several other European countries have faced comparable cases and have also had to rule on the impact of religious practices of parents on their children in the context of parental rights, such as custody, residential and contact rights.¹

The focus of this article is on these specific types of cases, namely cases in which parents disagree about religious issues. These cases are interesting because in a liberal and secular society the state should adopt a non-interventionist attitude towards religious upbringing when parents agree with each other.² Only when the interests of the child are seriously harmed may the state intervene in accordance with the legal grounds in national law and in compliance with international law standards, such as Articles 8 and 9 European Convention on Human Rights (ECHR). However, when parents do not agree with each other, the court sometimes has to make a decision which affects the parenting freedom or the religious freedom of one of the parents.³ Both in the Netherlands and in the Council of Europe the guiding principle in this regard is the best interests of the child. So, the state sometimes intervenes in religious upbringing in these cases, but how is that done? How does the judge navigate the tension of state intervention in the private sphere and the tension between a

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1 This article is based on our previous (Dutch) publication: M. Jonker, R. van Spaendonck & J. Tigchelaar, 'Religie en cultuur in familierechtelijke beslissingen over kinderen', (2015) *Familie en Recht*, <http://doi.org/10.5553/FenR/.000020> and is inspired by Langlaude's article on the position of English law concerning parental disputes about the religious upbringing of children. S. Langlaude, 'Parental Disputes, Religious Upbringing and Welfare in English Law and the ECHR', (2014) 9 *Religion & Human Rights*, no. 1, pp. 1-30. We would like to thank C. Mol for her assistance with this article.

2 J. Eekelaar, 'Children between cultures', (2004) 18 *International Journal of Law, Policy and the Family*, no. 2, <http://doi.org/10.1093/lawfam/18.2.178>, p. 180; R. Taylor, 'Parental Responsibility and Religion', in S. Gilmore et al. (eds.), *Parental Responsibility and Responsible Parenting* (2009), pp. 123-124.

3 See also S.E. Mumford, 'The Judicial Resolution of Disputes Involving Children and Religion', (1998) 47 *International and Comparative Law Quarterly*, no. 1, <http://dx.doi.org/10.1017/S0020589300061583>, pp. 117-148.

secular state and religious upbringing? To answer these questions Dutch case law is analysed: how does the judge determine the best interests of the child? Which criteria does the judge use?

In order to verify whether the Dutch approach stands on its own or whether similar criteria and considerations are used elsewhere, the case law of the European Court of Human Rights (ECtHR) is also analysed and linked to the Dutch case law. The case law of the ECtHR is relevant in two ways: it clarifies which criteria applied by national judges may be valid, and also under which conditions these criteria are justified.

It is interesting to bring the national and international level together. On the national level the (lower) court is confronted with the disagreement of the parents about the impact of religious views or practices on their children and has to decide, as a state institution, primarily in the best interests of the child. On the international level, however, the ECtHR is confronted with a complaint by one of the parents about the national court's decision. This means that the ECtHR does not look at the best interests of the child directly, but assesses whether the state has violated the right of a parent.⁴ Thus an analysis of the national and international level brings together the assessment by both the state and the ECtHR, as to whether interference with the private and/or religious rights of one of the parents is justified because of the interests of the child.

The main question is:

'Which factors are used in Dutch family law decisions and in the case law of the European Court of Human Rights to determine what the best interests of the child require in a case where parents disagree about religious issues in the upbringing of the child, and how are these factors assessed?'

These issues will be addressed by describing and analysing court decisions in cases of religious disputes between parents for the Netherlands (Section 2) and for the European Court of Human Rights (Section 3). The factors at national and international level that are most directly related to the religious ideas or practices of parents will receive special attention and will be categorized, as it can be assumed that these factors give a general indication of what courts view as especially relevant for assessing the well-being of the child in these kinds of cases. This gives an insight into the reasons that are considered valid for state interference in religious disputes between parents. This analysis is completed by highlighting the norms of the ECtHR about how these factors concerning the interests of the child should be assessed. These norms further limit legitimate state intervention in issues of religious upbringing. These norms also allow an assessment to be made as to whether the Dutch case law is in conformity with the case law of the ECtHR (Section 4).

2. Court decisions in the Netherlands

2.1. Introduction

In this section, all published,⁵ relevant Dutch case law concerning parental disputes about the religious upbringing of children will be described. The case law was found through digital search systems⁶ using two approaches. Firstly, search words from family law were selected (for instance, parental responsibilities) in combination with a word referring to religion in general or a specific religion, like Christianity or Islam. Secondly, search words were used from well-known religious disputes between parents, like disputes about the circumcision of a boy. No restrictions were made with regard to time or type of court. Only parental dispute cases were selected. This means that child protection cases were not included. This search produced 16 court decisions. Seven of those decisions are left out of the description and analysis in this article, because the religious aspect turned out to be a minor or unclear element of the case and judicial decision. The analysed case law can be categorized into conflicts about schooling (four cases), religious

4 It is not the role of the European Court of Human Rights to substitute itself for the competent national courts in regulating parental rights and determining the best interests of the child, but rather to review, in accordance with the European Convention on Human Rights the decisions that those authorities took in exercising their powers. See: *Gineitiene v. Lithuania*, 27 July 2010, ECtHR, no. 20739/05, para. 37.

5 Not all case law is published in the Netherlands.

6 <www.rechtspraak.nl> and <www.rechtsorde.nl>.

rituals of circumcision and baptism (three cases), and contact rights (two cases). In most cases, the parents have joint parental responsibility.

In order to understand the relevant case law, it is important first of all to outline the Dutch legislation on parental responsibilities.⁷ In the Netherlands, when the holders of parental responsibility do not agree on issues concerning the child, both of them may request a decision by the district court.⁸ Before taking a decision in *the best interests of the child*, the court will try to effect a reconciliation between the parents.⁹ Dutch legislation does not provide which factors have to be taken into account when considering the best interests of the child. This also means that judges have a wide margin of appreciation. If the child does not live with both parents, for example after the parents have got a divorce, a distinction is made between disputes that concern daily matters and disputes that concern important matters.¹⁰ While the parent with whom the child lives may decide by himself/herself on daily matters, the non-residential parent must agree on important decisions, such as school choice, medical treatment, religious upbringing and the place of residence.¹¹

In some of the studied cases, only one of the parents has parental responsibility. The legal framework in such cases is different, because it implies that, in principle, this parent can exclusively decide on all aspects concerning the child's upbringing.¹² However, the parent without parental responsibility still has contact rights¹³ and/or may, for instance, use preliminary relief proceedings to object to religious rituals.

In order to understand the case law below, it is important to understand that religion related cases can be put forward to the court in two separate ways. In the first type of proceedings, a court will receive a request by one of the parents asking for a specific court order. The best interests of the child will be the test to be applied by the court in order to decide the case. In a second type of case, a parent may ask for provisional relief in order to prevent a specific situation; for instance a petition for a court order to withdraw the children from a specific school. Such proceedings are only open in a case where one of the parents has an 'urgent interest'.¹⁴

2.2. Choice of school

Choice of school is not always related to religion, but when parents do not agree about a specific religious or non-religious school, the court has to deal with this religion related aspect. In all four studied cases concerning the choice of school, the parents had joint parental responsibility. This means that both have to consent with the choice of school. When they are not able to reach an agreement, one or both of them may request a decision by the court.¹⁵

In 2009, the Leeuwarden Court of Appeal stated that 'in principle, changing schools is not in the best interests of the child'.¹⁶ This indicates the importance of *stability and continuity*. In this case, the father of an approximately 5-year-old child appealed against the decision of the 'preliminary relief judge'

7 See for general information on parental responsibilities in the Netherlands: C.G. Jeppesen de Boer, *Joint Parental Authority* (2008).

8 Art. 1:253a Dutch Civil Code (DCC) (Section 1: 'In the event joint parental authority is exercised, disputes in respect thereof may, on the application of the parents or either of them, be submitted to the district court. The district court shall take such a decision as it considers desirable in the best interests of the child', translation Warendorf Dutch Civil and Commercial Law Legislation). Married parents will have joint parental responsibility by law, when a child is born (Art. 1:251 DCC). If a child is born out of wedlock, only the birth mother will obtain parental responsibility automatically and the other parent may request joint parental responsibility, either together with or without the birth mother (Art. 1:253b in conjunction with 1:252 or 1:251c DCC). The other parent may also request sole parental responsibility; however, this is only granted in exceptional cases.

9 *Kamerstukken II* 1979-1980, 16247, no. 3, p. 6.

10 K. Boele-Woelki et al. (eds.), *European Family Law in Action* (2005), p. 511; C.G. Jeppesen de Boer, *Joint Parental Authority* (2008), p. 246.

11 *Kamerstukken II* 1996-1997, 23714, no. 11, p. 12; E.J. Nicolai, 'De juridische positie van de niet- verzorgende ouder na scheiding', *NJ* 1998, p. 698.

12 Art. 1:247 DCC (Section 1: 'Parental authority comprises the duty and the right of the parent to care for and raise his or her minor child', translation Warendorf Dutch Civil and Commercial Law Legislation).

13 Art. 1:377a DCC (Section 1: 'A child has the right of contact with its parents and with the person with whom it has a close personal relationship. A parent not vested with parental authority has the right and the obligation to have contact with its child', translation Warendorf Dutch Civil and Commercial Law Legislation).

14 Art. 1:254 Dutch Civil Procedure Code.

15 Art. 1:253a DCC.

16 Court of Appeal Leeuwarden 10 November 2009, ECLI:NL:GHLEE:2009:BK2889.

(*voorzieningenrechter*),¹⁷ while main proceedings were already pending. The father requested, among other things, to move the child from a non-Christian school to a Christian school. The Court of Appeal dismissed the claim, since it was not *evident* that the court in the main proceedings would grant this request and changing schools twice in a short period of time would not be acceptable. One of the reasons why it was not considered evident by the court was because the mother had disputed the statement of the father that during their relationship they had chosen a Christian upbringing and a Christian school. The fact that this case concerned a request for a preliminary relief order is important in understanding this judgment, since it implies that the court was not able to perform an in-depth assessment of the best interests of the child.

The elements of *stability and continuity* were also emphasised by the District Court in Middelburg in a case in which the father requested permission to withdraw his two children (11- and 4-years-old) from the Christian school they were sent to by the mother, and to register them at a secular school.¹⁸ The parents separated in 2008 and in 2010 the mother moved, with the consent of the court, to another town.¹⁹ After having informed the father, the mother registered the older daughter at a Christian school. The father objected, after which mediation took place in which the parents agreed that in the future they would jointly decide on which school the children would attend. Nevertheless, the mother registered the younger daughter at the same school without the permission of the father. The court held that the children had been subject to many changes in the last few years and that it would be in their best interests to have some peace and stability in their lives. This argument, to attain ‘peace and stability’ prevailed; the arguments of the father were that he himself had had a negative experience with Christian education during childhood and also that the identity of his children’s school conflicted with the beliefs of the parents.²⁰ In addition, due weight was given by the court to the fact that the children were not the only non-Christian children who were attending the school. This implies that the element of *social isolation* also played a role in this case, since the children would not necessarily be socially excluded.

Comparable consideration with regard to avoiding *social isolation* was taken by the Arnhem-Leeuwarden Court of Appeal in a case in which the Muslim father wanted his child (5 years old) to go to a secular school instead of the Catholic school where the mother had enrolled the child.²¹ The fact that the school was willing to take into account the Muslim background of the child and that there were other Muslim children attending the school, were considerations in favour of letting the child attend the Catholic primary school. However, in this case most value was attached to the interests of the child in attending a school close to the mother’s house, where the child mostly lived, taking into account the socio-emotional development, practical, and traffic safety considerations. In other words, *practical considerations* were decisive in this case.

In another case, a father who was gay did not want his child to be enrolled at an Evangelical high school, because this school was opposed to homosexuality.²² He feared that the child (13 years old) would become alienated from him or that the child could be bullied because of his father’s sexual orientation. While the father invoked the element of *social isolation*, the judge considered that a decision which went against the school choice of those who would be confronted the most by the consequences of that choice – in this case the minor son and the mother – generally would not be in the interests of the concerned minor. For a court to countermand the school choice of the residential parent (and the child), evidently good reasons need to be proved.²³ This implies, according to this judgment, that the residential parent has a stronger say in these kinds of disputes than the non-residential parent.

These cases show that Dutch courts emphasise the importance of *stability and continuity*, *practical considerations* for the residential parent and the child and *social isolation* in disputes concerning choice of school. Although courts refer to social inclusion, this element does not seem to be of decisive importance.

17 In urgent cases where the parties require immediate relief, the preliminary relief judge of the district court may have jurisdiction. The provisional decision may get a follow-up in main proceedings with a full decision before the district court.

18 District Court Middelburg 27 July 2011, ECLI:NL:RBMID:2011:BR4563.

19 The father had not given his permission, because he was afraid that the children would grow up in a Christian community.

20 Partly because the father previously had consented to a Catholic school (due to practical considerations).

21 Court of Appeal Arnhem-Leeuwarden 10 January 2013, ECLI:NL:GHARL:2013:BZ1919.

22 District Court Haarlem 4 August 2008, ECLI:NL:RBHAA:2008:BD9377.

23 In addition, the fear of the father that his child would abhor his homosexuality under the influence of the school, was not considered a good reason, because it ‘concerns an uncertain future event’.

More weight is given to stability and continuity and to practical considerations. It is unclear what role the joint parental choice for a specific religious upbringing could play in a case where there was sufficient evidence of such a parental agreement in the past. Does this make the claim to change schools (to a school that teaches the agreed religion) more likely? Or is continuity of the religious education a relevant factor for the well-being of the child?

2.3. Religious rituals

As a result of a religious upbringing, children may be subject to religious rituals. In two of the three cases there was a conflict between parents as to whether or not to circumcise a minor boy. The third case concerned baptism.

In a parental conflict between the parents in which the Moroccan mother wanted her son to be circumcised when he reached 5 years of age, for religious and cultural reasons, but the Dutch father disagreed, the judge explicitly considered that there was a conflict between parents with different cultures.²⁴ The court emphasized the *freedom of choice of the child in the future*, by considering that the circumcision could still take place when the child was able to decide for himself. The judge found that he should be more reluctant to make a decision on request which would result in an *irreparable physical operation* without medical necessity. In addition, the court stated that the child would not become *socially isolated* if he were not circumcised: '[The child] was born in the Netherlands and, in any case, has Dutch nationality. He is embedded in Dutch culture and attends a secular school. It has neither been argued nor proved that, if he is not circumcised, he will be singled out at school by the majority of Turkish boys who are also Muslim.' Finally, the judge considered that the opinion of the mother's family in Morocco might 'certainly not be decisive'.

In another dispute a Hindustani man asked for provisional relief against his ex-partner, who was Muslim, to prevent her from circumcising their son (7 months old).²⁵ The judge in preliminary relief proceedings found that this problem did not lend itself to preliminary relief proceedings, mentioning that he had too little knowledge on the issue. Nevertheless, he granted the injunction for two years, because the man – who was not the legal father and who did not have parental responsibility – wanted to initiate proceedings on the merits and a judgment in the main proceedings was possible within two years. The judge found, on the one hand, the *consequences of being uncircumcised in a Muslim community* 'certainly important' for the boy, and on the other hand, the consequences of the fact that circumcision cannot be undone of 'crucial importance' were the boy later to *choose* the Hindu faith.

Another ritual which has led to a case is the baptism of a child.²⁶ A biological father without parental authority wanted, through preliminary relief proceedings, to prevent his child from being baptized.²⁷ He deemed it in the interests of the child that he could, in due course, make a choice in religion himself, even though the father himself did not have any religion in which he wanted his child to participate. The foster parents wanted the child to be baptized as did the child himself. The judge in preliminary relief proceedings found it in the interests of the child that the child would have the feeling of *belonging in the Roman Catholic environment in which he would grow up*. The biological mother, who had no parental responsibility, also wanted the child to be baptized as she also had had a Roman Catholic background. Since it was the *wish of the minor* to be baptized and it *did not limit the freedom of choice at a later age*, the judge granted permission for the baptism.

In cases concerning religious rituals two elements seem important: on the one hand *freedom of choice (in the future)* and, on the other hand, the danger of *social isolation*. With regard to the latter, if a child is not subject to the religious ritual (circumcision or baptism) this may result in the child being excluded by the religious group to which he or she belongs. While this argument was given due weight in the baptism case, it is of less importance in the circumcision cases. This can be explained by the fact that the other element, the freedom of choice with regard to physical appearance, is considerably different in the two

24 Court of Appeal 's-Hertogenbosch 26 November 2002, ECLI:NL:GHSHE:2002:AF2955.

25 District Court Groningen 11 December 1996, KG 1997, 36.

26 The age of the child is not published.

27 District Court Middelburg 14 November 2006, ECLI:NL:RBMID:2006:AZ8230.

types of cases. A child who is circumcised has a limited choice in the future, since it is an irreparable physical operation without medical necessity, whereas a child who is baptised will not have this physical limitation. For this reason, the courts were less likely to intervene and decide in favour of circumcision than they were to decide in favour of baptism.

2.4. Contact rights

Contact with both parents is considered in the best interests of the child, therefore both the child and the non-residential parent have a right to contact.²⁸ Only in exceptional cases can this right be denied; for instance, if contact would be seriously detrimental to the mental or physical development of the child or if contact were contrary to the paramount interests of the child.²⁹ Differences in beliefs between parents can be a core issue in conflicts concerning contact rights. Residential parents may argue that contact with the other parent is not in the best interests of the child, because the lifestyle of the other parent, as a result of the exercise of his or her religion, deviates from his or her own lifestyle and from societal norms. In the cases studied, two cases were found where only one of the parents (the mother) had parental responsibility.

The first case regards the request of a father in preliminary relief proceedings for a one-off expansion of the contact arrangements,³⁰ so that his son could be present at his civil marriage with his new partner, the church ceremony, the dinner and the wedding party.³¹ The mother, who had sole parental authority, and the son objected to attending the church ceremony, because they attended a church of another denomination. The judge first stated that everyone in society was confronted with other views and that this should be a part of the child's upbringing. Subsequently, the judge decided, because the mother had sole parental authority, the son had his habitual residence with her and the mother was the one responsible for the daily care and upbringing, that she could decide, in principle, how the son was to be brought up in religious matters. The court held: 'Now that she [the mother] does not want the son to attend the church ceremony and a decision on this matter affects the right to freedom of religion, the requested relief must, therefore, be rejected to that extent.' The court found that *the opinion of the son* was decisive as to his desire not to be present at the dinner and the party, because music would have been played there, which he was not used to. The judge then held that, even if the opinion of the son had been formed to a considerable degree by his upbringing by his mother, that was not a reason to force him to attend the dinner and the party. After all, the son had to continue *to be accepted* in the church community of which he was a member.

Explicit reference was made to the freedom of religion of the mother, in connection to how she brought up the child in religious matters. Furthermore, the judge attached more weight to her view as the parent with sole parental authority and to the opinion of the child himself than to the arguments of the father. The judge also emphasized, when refusing the expansion of the contact arrangements, the point that the child would continue to need to be accepted in his social environment, even though the father's request only concerned a one-off expansion.

In the second case, a father applied to the District Court in The Hague for a contact order.³² Following supervised contact with the children, the parents tried to reach an agreement regarding contact but this failed. The mother argued that she did not trust the father and that she was opposed to any contact arrangements for the father, because she was worried about the way in which he confronted the children with his religious beliefs. As a result, the children were faced with new rules (such as taking a shower in their underwear) and with the father's changing behaviour. In addition, the father failed to comply with the agreements made and did not communicate with the mother. In this case, the court emphasized that minor children have the right to contact with both parents. This legal starting point is based on the idea that contact with both parents is important for the *psychological well-being* of the children. Only in exceptional

28 S.F.M. Wortmann, *GS Personen- en Familierecht*, Art. 1:377a BW, aant. 19.

29 Arts. 1:377a(3) DCC and 1:253a(2a) DCC.

30 Art. 1:377a DCC.

31 District Court Zwolle 22 February 2001, *KG* 2001, 122. The age of the boy was not published; however, it is likely that he was older than 12, since he was listened to by the court.

32 District Court The Hague 9 July 2014, ECLI:NL:RBDHA:2014:9027. The age of the children was not published.

circumstances can the court decide otherwise. Since the welfare report did not indicate such circumstances, the court granted the father contact rights. However, the court decided that the father should have limited contact hours with the children, because the children would be ‘confronted with the religion of the father and the parents are not able to come to an agreement in this respect’. The court argued that this would affect the children who were still very young. In addition, the mother, who had sole custody, did not choose to raise the children in accordance with the father’s religion, since the father had changed his religion following the break-up. The fact that the mother had sole custody meant that she could decide about the religious upbringing of the children. Although the mother requested the court not to grant contact rights to the father, the court decided otherwise. It considered that children who live with both their parents may also be confronted with two (completely different) beliefs of their parents. In general, *children should be flexible enough* to deal with these kinds of differences. Moreover, the court was of the opinion that the *mother would provide a stable environment* for the children, and therefore that they would be able to deal with the differences at their father’s home.

The basic principle is that a child has a right to contact, since it is important for his or her psychological well-being (and identity formation). Only in exceptional circumstances can this right be denied. The fact that a parent practises another religion is not sufficient to deny that parent his or her contact rights. Factors that do play a role are the opinion of the child, social inclusion (by the religious community) and stability (but also flexibility).

2.5. Dutch case law: conclusion

A distinction has to be made between two different procedures, the ‘normal’ request procedure and the preliminary relief procedure.

In the normal request procedure the judge has to take into account all kinds of factors that enable him or her to take a positive decision serving the best interests of the child. The judge is thus dependent on what the parties argue. This offers an explanation as to why all the previously mentioned factors that are identified in Dutch case law play a role in the determination of the best interests of the child without a clear hierarchy. There is, however, one exception. The court has declared itself reluctant to agree to a request for circumcision of a boy, both because of the fact that the circumcision cannot be reversed and because of the absence of medical necessity.

In a case where a parent starts a preliminary relief procedure in order to get a quick provisional decision, the judge will not decide ‘merely’ what is in the best interests of the child, but will take into account whether it is evident what the court in the main proceedings will decide to be in the best interests of the child. It turns out that changing schools is not considered to be *evidently* in the best interests of the child. Continuity receives more weight in this type of procedure. Also, a decision that entails a fact that cannot be undone or limits the freedom of choice in the future will not be considered *evidently* to be in the best interests of the child, as the preliminary relief decisions to prevent a circumcision and to permit baptism show.

3. Case law of the European Court of Human Rights

3.1. Introduction

During about the last twenty years the European Court of Human Rights has regularly been asked to review a national court’s decision that originated in a disagreement between parents about religious views or practices.³³ In these cases, one of the parents complains about the national court’s decision, thus taking the conflict up to the level of state intervention. The conflicts between a parent and the state concern decisions of the national courts regarding parental rights, the place of residence of the children and (denial of) contact rights. The ECtHR is inclined to assess state decisions in parental disputes about religious upbringing

³³ In some of the cases the other parent brought the matters of disagreement to the attention of a national court; in other cases the domestic court was informed about these matters by a reporting authority, such as the Child Rights Protection Agency (see *Gineitiene v. Lithuania*, 27 July 2010, ECtHR, no. 20739) or an expert psychologist (see *Vojnity v. Hungary*, 12 February 2013, ECtHR, no. 29617/07).

primarily on the basis of Article 14 in conjunction with Article 8. In other words, the focus of the ECtHR is on whether the domestic court ruling constitutes discrimination on the ground of religion as regards the right of the parent to private and family life.³⁴ This means that the ECtHR does not look at the best interests of the child directly, but assesses whether the national courts have violated the right of a parent. Nevertheless, the case law of the ECtHR is rich with references to factors that are used to identify the best interests of the child. These factors are mainly mentioned in the reasoning of the national courts' decisions, but are sometimes formulated by the ECtHR itself. In legal literature, the assessment of the ECtHR in these kinds of cases has been subject to discussion; however, which factors are mentioned by the national courts has not been examined so far. In this section a description will be given of the factors that are used by the national courts to identify the best interests of the child and the way in which these factors are assessed by the ECtHR. The case law was found through the digital search system Hudoc, using 'child and religion' as search words and 'Article 9' and 'English' as filters,³⁵ which resulted in 65 cases. Only the parental disputes were selected (excluding child abduction). This resulted in seven relevant cases.

3.2. A high standard of objectivity

In the well-known case of *Hoffmann v. Austria*, the ECtHR provided for the first time some guidance with regard to decisions concerning religious disputes between parents.³⁶ The case concerned a custodial dispute between a woman who was a Roman Catholic, as was her husband, but who became a Jehovah's Witness. The father contended that the religious upbringing by the mother would be harmful to the children, who would experience social isolation and risks to their life and health because of the prohibition on blood transfusions by Jehovah's Witnesses. The Austrian Supreme Court took into account the fact that the children received a religious upbringing in contradiction to the Law of 1921 on the religious education of children, which stated, inter alia, that a parent is not allowed *to change without the consent of the other parent the religious upbringing* on which they have agreed or to which a child has hitherto been exposed. Moreover, the Supreme Court considered the delay in the case of a judicial order for blood transfusions as well as the *social integration problems* (that would render the children 'social outcasts') more threatening for the well-being of the children than did the lower courts. Lastly, it considered the *psychological harm* involved in the transfer to the father to be transitory and acceptable in the best interests of the children. Therefore the parental rights and duties were granted solely to the father.

The European Court of Human Rights considered the Austrian Supreme Court's reference to the Law of 1921 on religious education as decisive for its decision, which – according to the ECtHR – led to a difference in treatment between the spouses on the ground of religion (paragraph 33).³⁷ Although the different treatment had a legitimate aim – the protection of the health and rights of children – the ECtHR considered the means employed to be disproportional and thus discriminatory within the meaning of Article 14 in conjunction with Article 8 ECHR. The decision of the ECtHR in *Hoffmann v. Austria* has become well known because of its consideration that: 'Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable' (paragraph 36). The decision of the ECtHR in *Hoffmann v. Austria* is also cited because it contains the assessment that attaching decisive importance to a parent's religious affiliation is not allowed (paragraph 33).

34 In most cases the ECtHR declines to address claims under Art. 8 of the Convention taken alone or under Art. 9 (freedom of religion) taken alone or in conjunction with Art. 14, with the consideration 'that no separate issue arises under these provisions, since the factual circumstances relied on are the same as those for the complaint examined under Article 14 taken in conjunction with Article 8'. See *Vojnity v. Hungary*, 12 February 2013, ECtHR, no. 29617/07, para. 45. The ECtHR dismissed, in very general words, a complaint about violation of Art. 9 in conjunction with Art. 14 in *Deschomets v. France*, 13 May 2006, ECtHR, no. 31956/02. It held that 'the conditions governing the exercise of parental responsibility for the children (...) were not capable *per se* of interfering with the applicant's right to practise her religion'. Uitz argues that the ECtHR's current focus on Art. 8 in conjunction with Art. 14 'seems to bypass the kernel of the dispute: the religious freedom (Article 9) of the parent (and child)'. R. Uitz, 'Rethinking *Deschomets v. France*: reinforcing the protection of religious liberty through personal autonomy in custody disputes', in E. Brems (ed.), *Diversity and European Human Rights* (2012), pp. 173-174.

35 English is relevant here because not all the case law is published in English.

36 *Hoffmann v. Austria*, 23 June 1993, ECtHR, no. 12875/87.

37 The ECtHR is of the opinion that this is supported 'by the tone and phrasing of the Supreme Court's considerations regarding the practical consequences of the applicant's religion' (para.33).

These considerations seem to indicate that the factor of religion, as such, is not a legitimate factor to permit parents to be treated differently. More importantly, it gives some direction to national courts as to *how* to assess religious conflicts between parents, although it is not always easy to indicate when a distinction is *essentially* or *decisively* based on religion (alone).³⁸

To determine other factors that are considered relevant in religious disputes between parents, the words in paragraph 36 already mentioned, namely ‘notwithstanding any possible arguments to the contrary’, are of interest. They refer to the facts of the case. With regard to these facts – or factors – the ECtHR considered that ‘the factors relied on by the Austrian Supreme Court in support of its decision [namely, threats to social integration and physical health] in themselves may be capable of tipping the scales in favour of one parent rather than the other’ (paragraph 33). This implies that the possible negative effects of a religious upbringing like *social integration* and *physical health*, as such, are considered as relevant factors.

With regards to the way of assessing the factors, it also seems important that if the factors do not imply a clear decision about the religious upbringing, court decisions have to meet high standards of ‘objectivity’. This can be deduced from the critical remarks of the ECtHR about the fact that the Austrian Supreme Court did not take into account expert psychological evidence which had been used by the lower courts and about the tone and phrasing of the Supreme Court’s considerations regarding the practical consequences of the applicant’s religion, which confirmed the different treatment on the grounds of religion.

The decision of the ECtHR in *Palau Martinez v. France*³⁹ clarifies the requirement of objectivity, which had already been more or less stated in the decision in *Hoffmann v. Austria*. In *Palau Martinez v. France*, the ECtHR dismissed a national court’s decision that asserted generalities about a religion without any direct, concrete evidence on the influence of the parent’s religion on the children’s upbringing and daily life.

The underlying dispute between the divorced parents regarded the place of residence of their two children. Crucial in the national proceedings was the consideration of the French Court of Appeal that ‘(t)he rules regarding child-rearing imposed by the Jehovah’s Witnesses on their followers’ children are open to criticism mainly on account of their strictness and intolerance and the obligation on children to proselytise. It is in the children’s interests to be free from the constraints and prohibitions imposed by a religion whose structure resembles that of a sect’ (paragraph 13). The Court of Cassation ruled that the Court of Appeal was not obliged to order a social inquiry report and had not interfered with the applicant’s freedom of conscience.

The ECtHR considered that the French Court of Appeal ruled *in abstracto* and on the basis of general considerations, without establishing a link between the children’s living conditions with their mother and their real interests. Although relevant, that reasoning was not sufficient in the view of the ECtHR. The ECtHR concluded that the decision violated Article 8 of the ECHR in conjunction with Article 14. The importance of the decision of the ECtHR in *Palau Martinez v. France* lies primarily in the requirement of *how* possible relevant factors should be assessed. Relevant factors should be assessed on the basis of direct, concrete evidence of the impact of the religion of the parent on the daily lives and upbringing of the children. This implies that the ‘generalities concerning Jehovah’s Witnesses’ like the strictness, intolerance and the obligation to proselytise can be relevant factors to take into account when deciding about the interests of the children, but only if there is concrete evidence of how these factors work out in the reality of the daily lives of the children.

3.3. The prevailing interests of the child

In contrast to the two preceding judgments, *Deschomets v. France*⁴⁰ concerns an inadmissibility decision in which the ECtHR did not find that the decision of the national court constituted any difference in treatment between the parents on the ground of religion, as set out in Article 14 of the ECHR. In contrast, the different

38 It is telling that in the *Hoffmann* case four judges dissented. Three of the dissenting judges made a distinction between the mother’s religion (as a cause) and the *consequences* of that religion for the well-being of the children and were of the opinion that other arguments played a role as well.

39 *Palau-Martinez v. France*, 16 December 2003, ECtHR, no. 64927/01.

40 *Deschomets v. France*, 13 May 2006, ECtHR, no. 31956/02.

treatment of the parents was considered to be dictated by the children's best interests. The added value of the case lies firstly in several factors which determine the best interests of the child and secondly, in the explicitly indicated weight of the interests of the child, which 'is the factor that, in the Court's view, should prevail when considering the rights of the parents, as guaranteed by Article 8 of the Convention, and those of the children'.⁴¹

The case of *Deschomets* concerned a French couple with two sons, who originally belonged to the religious movement of the Brethren. After the father had left this movement, the mother, who stayed with the Brethren, brought separation proceedings in which the mother was granted custody and the father visiting rights. Thereafter, several procedures took place. The national Court of Appeal found that the chosen visiting and contact hours obliged the children to travel a lot, which is 'hardly conducive to their stability'. The Court of Appeal also considered that 'it is not for the court to decide whether or not the Brethren movement constitutes a sect, but simply to determine whether the constraints imposed on the children, because of the mother's affiliation to the movement, do not run counter to their interests'. Based on the welfare report, the court emphasized that 'the obligations and prohibitions thus imposed on the children, based on the idea that everything outside the movement is "evil", [are] unquestionably harmful to the children's development and social integration'.⁴²

The ECtHR stated – in line with *Palau Martinez* – that the French Court of Appeal assessed the actual interests of the children and gave a ruling *in concreto* which was based on the actual consequences of the mother's lifestyle for the children. The Court of Appeal had analysed the boys' daily living conditions at the respective homes of each of their parents and took into account undisputed sections of the welfare report that stated, inter alia, the 'rejection of their mother's religious practice and way of life' by the two boys. The ECtHR then continued in the spirit of *Palau Martinez* and *Hoffmann* to consider that although the lifestyle stemmed from the mother's religious practice, it cannot be said 'that the domestic courts attached decisive importance to that practice or that they generally criticised the Brethren movement *per se*'. The ECtHR pointed out that no theoretical discussion and, therefore, no value judgments regarding the mother's conceptions and ideological practices can be found in the national courts' decisions. In fact, those decisions were grounded on 'the children's best interests, taking into account *their reactions to the lifestyles of both their parents*, in conformity with the Court's case-law, which has been inspired in particular by Article 3 of the United Nations Convention on the Rights of the Child (...)'.⁴³

The *Deschomets* case refers to a number of relevant factors for the well-being of the child. The domestic family court looked at the physical living conditions, care and education provided by the parent(s), as well as at the emotional well-being (indicated as being unhappy and afraid) and choice of the children. The Court of Appeal took into account the factor of stability with regard to the visiting arrangements. It mentioned the factor of (the harm to) the children's development and social integration in relation to the religious affiliation of the mother. The ECtHR considered the daily living conditions of the children relevant, but seemed to attach special importance to the reactions of the children (and especially their choices related) to the religious practice and way of life of both their parents.⁴⁴ With respect to the reactions of the children, the age of the children was probably also a significant factor; they were 10 and 13 at the time of ruling of the Court of Appeal of France.

Interestingly, the ECtHR explicitly connected the reactions of the children to the lifestyles of their parents, with the children's best interests. Furthermore, the ECtHR indicated that the children's interests should prevail when considering the rights of the parents and those of the children in the light of Article 8. Thereby the ECtHR introduced a children's rights perspective into the predominantly parents' rights orientation of Article 14 in conjunction with Article 8.

41 *Deschomets v. France*, 13 May 2006, ECtHR, no. 31956/02, p. 12.

42 *Ibid.*, pp. 5-6.

43 *Ibid.*, p. 12.

44 R. Uitz, 'Rethinking *Deschomets v. France*: reinforcing the protection of religious liberty through personal autonomy in custody disputes', in E. Brems (ed.), *Diversity and European Human Rights* (2012), p. 176.

3.4. The margin of appreciation in justifying different treatment of parents

The case of *Ismailova v. Russia*⁴⁵ shows us how the margin of appreciation works with regard to justifying factors for treating parents differently. The most relevant justifying factors in this case are the social and psychological repercussions for the children caused by the mother's religious practices.

The case of *Ismailova* concerned a conflict about the custody of two children (aged 5 and 9 at the start of the court proceedings). The mother converted to the religion of the Jehovah's Witnesses and left the matrimonial home with her children to live at her parents' house. The District Court granted custody to the father and this ruling was upheld by the Russian Supreme Court. The ECtHR was of the opinion that the domestic courts had not decided the case solely or principally on the basis of the mother's religious affiliation, but solely on the best interests of the children. The national courts' reasoning 'was largely based on the children's *age* and the *financial, housing and general living conditions* the parents could provide them with' (paragraph 62). The Supreme Court's reasoning also entailed a reference to the mother taking the children with her to the sect's meetings, and involving them in associating with the sect's members at their homes. According to this Russian court this implied a violation of the constitutional right of the children to freedom of religion and conscience (paragraph 54).

The ECtHR steered clear of the assessment of this last-mentioned consideration, using two evasive routes. The ECtHR firstly maintained (in line with the *Palau Martinez* requirement) that 'it cannot be said that the domestic courts decided the present case solely or principally on the basis of the applicant's religious affiliation'. Secondly, the ECtHR indicated that assuming a difference between parents on the basis of religion, this different treatment could be justified: as far as the domestic courts did decide on the influence of the applicant's religion on her children's upbringing and daily life, this was based on direct and concrete evidence that the mother had included her children in her religious practices and had failed to protect them against social and psychological repercussions (paragraphs 59, 62).⁴⁶

In the *Ismailova* case several factors play a role. Some of these factors could play a role in any custody case, such as *school results, age* and *financial and living conditions* of the parents. Other factors, however, are explicitly related to the religious practices of the parent: the reference of the Supreme Court to the *constitutional rights of the children to freedom of religion and conscience* and the rather general factors of '*social and psychological repercussions*' which the ECtHR mentioned, that are based on concrete evidence of specific factors, such as *shyness* and *irritableness* as well as *not attending celebrations of peers*.

The judgment in the case of *Ismailova* shows that the ECtHR leaves a relatively wide margin of appreciation for the national authorities in assessing whether and to what extent differences between parents justify a different treatment (paragraph 57). This renders it legitimate for state authorities to consider amongst other factors the specific factors of shyness and irritableness as a consequence of attending religious meetings with one of the parents. Indeed, these factors could be considered relevant from a perspective of individual children's right to freedom of religion, as these negative emotional factors may indicate that the children experience an unwanted interference in their freedom.

Nonetheless, the case of *Ismailova* illustrates as well that a wide margin of appreciation renders it conceivable that religion is the 'main' reason for the difference of treatment of the parents, as long as factors that refer to the well-being of the child and which are construed as negative consequences of the religion are mentioned as well. It is telling that three judges of the ECtHR were not convinced at all that there had been no difference in treatment on the ground of the mother's religious practices as a member of the Jehovah's Witnesses.⁴⁷ The dissenting judges not only referred to the tone and phrasing of the

⁴⁵ *Ismailova v. Russia*, 31 August 2007, ECtHR, no. 37614/02.

⁴⁶ This evidence was found in the witness testimony of the grandmother, which fits with the report of the Custody and Guardianship Authority that 'after the meetings the children became shy and irritable, they perceived the surrounding world and natural phenomena in the way the "Jehovah's Witnesses" teaching presents it (the children were afraid of the "Worldwide Flood" whenever it rained, they called the [applicant's] mother-in-law "Satan", they would not attend their classmates' birthdays or other celebrations because the religion did not permit this)' (paras. 60-61). According to the ECtHR the domestic courts considered that these social and psychological repercussions would have negative effects on the children's upbringing (para. 62).

⁴⁷ The ECtHR considered that the parents were not in a comparable situation (para. 55), but continued to assume that there was different treatment on the ground of religion in an analogous situation (paras. 56-57). Thus, the ECtHR also considered whether the difference in treatment was justified.

considerations of the national courts regarding the practical consequences of the mother's religion, but also to the central place of these specific matters in the considerations, whereas other circumstances of the case, especially those relating to the upbringing of the children, were not taken into account and the interests of both parents were not properly balanced. For example, the national courts did not refer to any fact that would have shown the mother to be generally unfit to bring up her children, nor to the fact that the father was a seaman who was absent for half the year.

The *Gineitiene v. Lithuania* case⁴⁸ fits into the line of judgments of the ECtHR. This case concerned the custody of an 8-year-old daughter who lived with her mother in a small apartment on the premises of the headquarters of the Osho spiritual movement. The child did not suffer from the inclusion in the religious practice of the parent, but from the exclusion from it: the mother neglected her child because of her own religious practice. The ECtHR decided unanimously that there was no violation of the ECHR. The decision was relatively easy because of the *strongly and consistently expressed wish of the daughter* to live with her father and sister and close to other relatives and friends, combined with the repeatedly expressed fact by the daughter, which was also regularly observed by the local Child Rights Protection Agency, that *the daughter was often left alone, felt unsafe and was scared*. It was clear that the mother did not take proper care of her whereas the father could offer better *living conditions*. The argument that the child was socially isolated as a result of her mother's devotion to the Osho community was clearly established in court.

3.5. A stricter scrutiny

In the *Vojnity*⁴⁹ case, the ECtHR restricted the margin of appreciation for state authorities. The different treatment of parents, entailing a severe interference in the parental right to contact, in cases of communication about religion convictions between parent and child can only be justified on the basis of 'weighty reasons'.

The case concerned the decision to completely remove the contact rights of a father who tried to proselytise his son, which, according to the Hungarian Regional Court, resulted in *anxiety and fear* in the boy and endangered *his development*. The Hungarian Regional Court found in particular that the applicant's 'irrational worldview made him incapable of bringing up his child' and that he 'did not exercise his right of access in accordance with its purpose (...) but to impose his religious convictions on the child' (paragraph 14). The Regional Court relied heavily on the findings of an expert psychiatrist, who had examined the son and his brother, but not the father (paragraph 12).

The above cited phrases together with the absence of in-depth considerations of other factual or legal aspects resulted in the assessment by the ECtHR that the father's religious convictions had had a direct bearing on the outcome of the matter in issue. The ECtHR emphasized that in the context of the total removal of the father's contact rights with his son and in the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing an individual's self-fulfilment, such a differential treatment would only be compatible with the Convention if very weighty reasons for it existed (paragraph 36). Only in exceptional circumstances can contacts rights be removed, as it means *cutting a child off from its roots*, which is generally not in the interests of the child (paragraphs 39, 41). The ECtHR noted that although the Hungarian Regional Court used the word 'harm', as did the expert, no convincing evidence was presented to substantiate a *risk of actual harm*, as opposed to the mere unease, discomfort or embarrassment which the child might have experienced on account of his father's attempts to transmit his religious beliefs (paragraph 38). The Hungarian government did not consider less severe measures, which according to the ECtHR, amounted to a complete disregard of the principle of proportionality (paragraph 42).

The ECtHR recalled that Articles 8 and 9, as well as Article 2 of Protocol No. 1 to the ECHR, convey on parents the right to communicate and promote their religious convictions in the upbringing of their children. The ECtHR added that this would be an uncontested right in the case of two married parents sharing the same religious ideas or world-view and promoting them to their child, even in an insistent or overbearing manner. The borderline for married parents is when the child is *exposed to dangerous practices*

48 *Gineitiene v. Lithuania*, 27 July 2010, ECtHR, no. 20739/05.

49 *Vojnity v. Hungary*, 12 February 2013, ECtHR, no. 29617/07.

or to physical or psychological harm. The ECtHR saw no reason why the position of a separated or divorced parent who did not have custody of his or her child should be different *per se* (paragraph 37). This implies that the same standard of ‘weighty reasons’ should be applied to state interference in this right to the communication of religious convictions, namely the exposure of the child to dangerous practices or actual physical or psychological harm. Mere unease, discomfort or embarrassment is not enough. The ECtHR concluded that the father had been discriminated against on the basis of his religious convictions in the exercise of his right to respect for family life (paragraph 43).

The *Vojnity* case shows that the factor of *the risk of actual physical or psychological harm* provides an important standard for interference in the rights of parents to communicate and promote their religious convictions in the upbringing of their child. In addition, the factor that a child should not be cut off from his or her roots is relevant with regard to the parental right to have contact with or access to the child. This factor has great weight: a complete removal of contact rights is only legitimate when there are exceptional circumstances and less severe measures are not considered appropriate.⁵⁰

The ‘weighty reasons’ standard is being used by the ECtHR to indicate that distinctions made on some suspected grounds of discrimination (like gender, race and sexual orientation and now religion) should meet a stricter justification than the reasonable objective justification for differences in treatment on other grounds.⁵¹ Thus, although the ‘very weighty reasons standard’ is formulated in the context of the removal of contact rights, its meaning could lie in the more stringent justification of discrimination on the grounds of religion.⁵² However, it remains to be seen whether all aspects of religion are covered by the ‘weighty reasons’ standard, or primarily the aspects that are related to the *forum internum*, like the direct expression and conveyance of religious convictions as was the case with *Vojnity*.

3.6. European Court of Human Rights case law: conclusion

The case law of the ECtHR reveals a large number of factors that *national courts* apply to decide what is in the best interests of the child in cases of parental disputes about the religious upbringing of their children. Some of these factors are directly related to the religious practice of one of the parents. These factors can be brought under the following more general categories: social, physical and psychological (or emotional) well-being of the child, as well as respect for the choice of the child expressing his or her well-being. The added value of the ECtHR itself as regards the formulation of factors is limited. In some cases the ECtHR emphasizes a factor, like the *choice (or wishes)* of the children,⁵³ or translates factors that are used by national courts in quite general wording, such as *social and psychological repercussions*.⁵⁴ As far as the ECtHR formulates a factor, it is closely related to the way in which the factor is assessed,⁵⁵ as will be demonstrated below.

The case law of the ECtHR is especially acknowledged for how the factors are assessed. *Hoffmann* lays down that resolving a religious parental dispute essentially or decisively on religion (alone) is unjustified. *Palau Martinez* makes it clear that a court should decide *in concreto* on the basis of direct evidence on (the factor of) the impact of the religion of the parent on the daily life and upbringing of the child. *Deschomets* brings in explicitly the interests of the child as a prevailing factor when considering the rights of the parents to family life. *Ismailova* shows that the restriction of the parental right to take children to religious meetings because of the factor of psychological repercussions falls within the margin of appreciation to justify a difference of treatment between parents. *Vojnity*, however, adopts a new – and stricter – approach. Only ‘weighty reasons’ justify a difference in treatment between parents as regards the rights of parents to

50 See para. 40 in which the ECtHR reiterates that, in respect of restrictions on family life, a stricter scrutiny is called for concerning restrictions placed by authorities on parental rights of access than in the context of custody, as removal of access rights means cutting a child off from its roots

51 K. Henrard, ‘Ever-Increasing synergy towards a stronger level of minority protection’, in: *European Yearbook of Minority issues* (2004), p. 30. See also: A.W. Heringa, ‘Standards of Review for Discrimination: The scope of Review by the Courts’, in T. Loenen & P.R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives* (1999), pp. 29-31.

52 F. Tulkens, ‘Freedom of Religion under the European Convention on Human rights: A Precious Asset’, (2014) *Brigham Young University Law Review*, no. 3, p. 515.

53 See the case of *Deschomets*, supra note 34.

54 See the case of *Ismailova*, supra note 45.

55 Compare the decisions in the cases of *Palau Martinez*, supra note 39 and *Vojnity*, supra note 33.

communicate and promote their religious convictions in the bringing up of the child. These weighty reasons consist of the (factor of) exposure of the child to dangerous practices or to physical or psychological harm. Furthermore, only evidence of exceptional circumstances can justify a complete removal of the access rights of a parent

4. Overall picture of factors

The previous sections have shown that several factors may play a role in determining the best interests of the child in parental dispute cases concerning religious matters and have also revealed how these factors are assessed by the Dutch courts and the European Court of Human Rights. In this section we bring those factors together in order to get an overall picture of factors and to find out whether there are differences as to the use or interpretation of factors with regard to the topics between the case law of the Netherlands and the case law of the European Court of Human Rights. We will close the section with a discussion as to whether Dutch case law is in conformity with the case law of the ECtHR.

4.1. The topics of parental disputes

The Dutch cases concern parental disputes about the choice of schools, religious rituals and contact rights. Only one of the Dutch cases about contact rights is quite similar to a case in the ECtHR, namely that of *Vojnity* about contact rights. The national court decisions of other European states considered by the ECtHR, which are about custody and place of residence of the child, seem to differ from the topics of the parental disputes in the Netherlands. The differences between the topics imply that some factors are more related to the legal aspects than actually concerning the religious dispute itself. That is the case with the general living conditions for custody and residence rights, while practical considerations like the distance between school and home play a role in the schooling disputes. Nevertheless, although the topics differ to a large extent, it turns out that comparable factors play a role in determining the best interests of the child. For example, social isolation or integration play a role in the Dutch disputes about schooling, religious rituals and access rights, as well as in ECtHR cases about custody and place of residence. We will see that comparable factors may still have some different interpretations, depending on the topic.

4.2. Relevant factors

The case law of the ECtHR and Dutch case law show that several factors may play a role in determining the best interests of the child in parental dispute cases concerning religious matters.⁵⁶

Firstly, *stability and continuity* are considered to be in the best interests of the child, as they are necessary for the psychological well-being of the child. These elements are of relevance both in the cases brought before the ECtHR and in the Dutch cases. This factor is not necessarily connected to the religious aspects of a case. Only in one (contact) case in the Netherlands was it considered that if the religious upbringing of the individual parents differed too much, stability might be at stake, which is not regarded to be in the best interests of the child and consequently may result in restricted contact rights for one of the parents. In the *Vojnity* case the ECtHR drew a strict line with regard to the denial of access rights in religious parental disputes. Stress caused as a result of the father's religious practices (proselytism) was not sufficient. Children are expected to have some kind of flexibility (which can be considered the counterpart of stability) with regard to the parents' different religions. This is expected, because it is of importance for the identity formation of the child that he or she continues to have contact with both parents.

Secondly, *social isolation* or its counterpart *social integration* is frequently referred to as a relevant factor. In all the cases this factor was an (alleged) consequence of the religious views or practices of the parent. Several situations are conceivable in this regard. Children should not be isolated from society. They should be able to have contact with others, participate in social activities, etc. With regard to this aspect,

⁵⁶ Most of these factors are comparable with the factors found by Langlaude in English case law, see S. Langlaude, 'Parental Disputes, Religious Upbringing and Welfare in English Law and the ECHR', (2014) 9 *Religion & Human Rights*, no. 1, § 10 conclusion.

examples can be found in the ECtHR cases.⁵⁷ Interestingly, social isolation is also assessed by the Dutch courts, but in another context. The emphasis in the studied cases in the Dutch courts is not on isolation from society, but on exclusion by members of the (religious) community. In cases concerning religious rituals, like circumcision and baptism, it is considered what the consequences would be for the child with regard to the social acceptance by religious peers, family or the religious community, if the rituals were not to take place. In cases concerning the choice of school, courts take into account whether the child will be accepted if he or she were to join a school with a different religious background from his or her own.

Thirdly, religious practices of parents may have an impact on the physical and psychological well-being of the child. This factor is mostly addressed in the case law of the ECtHR. The prevalence of this factor in the considerations of the ECtHR could be explained partly by the Court's way of assessment: a different treatment of parents cannot be justified on the ground of the parent's religion. Only the concretely and directly evidenced impact of the parent's religion on the child counts as relevant. The evidence of the impact of the parent's religion is often found in welfare reports that refer to the physical and psychological well-being of the child. This does not imply that this is not considered to be a relevant factor in the Netherlands. It appears that in Dutch case law this factor is related to other factors concerning the best interests of the child, like having contact with both parents, social integration and the choice of the child.

Fourthly, a child has the right to be heard. In both the Dutch cases and the cases before the ECtHR, considerable weight is given to the *choice of the child*, including both the actual choice and future choice.⁵⁸ In both the Dutch case concerning the one-off extension of the contact arrangement, and the baptism case, the wish of the child was decisive. In the case where a child is too young to give his or her opinion, the child should have the opportunity to have a freedom of choice in the future. In this respect, the Dutch circumcision cases are relevant. The opinion of the child was also highly relevant in the ECtHR case of *Deschomets* in which the children rejected the religious practices of their mother. In *Ismailova*, the Russian Supreme Court explicitly stated that the religious practices of the mother, who took the children to meetings of the Jehovah's Witnesses, violated the child's right to freedom of religion. In other words, this is problematic with regard to the choice of the child. Interestingly, this factor is avoided by the ECtHR which prefers the factor of the psychological well-being of the child as the justifying factor for the different treatment of the parents.

Finally, the best interests of the child are not only determined by considerations of principle, but also by *practical considerations*, not related to the religious upbringing by the parents.⁵⁹

The factor that seems to be mostly related to the religious practices of a parent is social isolation or integration. This factor is interpreted differently by Dutch courts compared with the case law of the ECtHR. The factor that is most closely related to differences of opinion between parents with regard to religious upbringing is stability. The factor of practical considerations seems to be more related to the disputed topics, like custody, the place of residence or the change of school, than to the religious aspect of the dispute. In the case law of the ECtHR practical considerations also play a role in the assessment as to whether a decision of a domestic court is solely or decisively based on religion.

The physical and psychological well-being of the child is a factor that is referred to quite often by the ECtHR as evidence of the effect of the religious practice of one of the parents. In the Netherlands this factor seems to be more directly related to the interests of the child and is often mentioned in relation to other factors. The choice of the child is a relevant factor in the Dutch and ECtHR case law. Although the word 'right' to freedom of religion is not used by either the Dutch judges or by the ECtHR, in the Netherlands the choice of the child seems to be slightly more related to the actual and future religious freedom of the child than in the case law of the ECtHR that stays with the category of the interests of the child.

57 See *Hoffmann*, supra note 36, *Deschomets*, supra note 34, *Ismailova*, supra note 45 and *Gineitiene*, supra note 4.

58 With regard to the importance of a future choice for the identity formation of a child, see J. Eekelaar, 'Children between cultures', (2004) 18 *International Journal of Law, Policy and the Family*, pp. 186-187.

59 Clear examples can be found in the Dutch cases concerning the choice of school. Living conditions were found to be relevant in the case law of the European Court of Human Rights. See *Ismailova*, supra note 45 and *Gineitiene*, supra note 4.

4.3. Conformity of Dutch case law with decisions of the European Court of Human Rights

Now that we have an indication of the factors that Dutch judges and the ECtHR consider legitimate to take into account in decisions in parental disputes about religious issues, we will look briefly at whether there are indications that Dutch case law is not in conformity with the requirements of the ECtHR as to state decisions in parental religious disputes. The answer to this question will leave out the types of factors indicated and analysed above. After all, these factors fall within the margin of appreciation of the national courts, under the condition that a decision in a religious parental dispute should not be decided essentially or decisively on religion alone (*Hoffmann*). This leaves us to assess whether Dutch courts meet the standards of *how* these factors should be weighed.

There seems to be no problem in Dutch case law as regards the requirement of the ECtHR that the factors cannot be generalities about a religion, but only concretely and directly evidenced influences of the parent's religion on the children's upbringing and daily life (*Palau Martinez*). Neither can it be maintained that Dutch courts do not put the interests of the child first when considering the rights of the parents (*Deschomets*).

Only the new – and stricter – approach of the *Vojnity* decision can cast some doubt on that Dutch case law which was delivered before this decision. However, the doubt depends on the interpretation of the scope of the *Vojnity* decision. As previously said, the ECtHR used the 'weighty reasons' as a justification for a difference in treatment between parents with regard to their right to communicate and promote their religious convictions in the upbringing of their children. These weighty reasons consist of the exposure of the child to dangerous practices or to physical or psychological harm. If the weighty reasons approach is restricted to the parent's direct conveyance of religious ideas to the child, then Dutch case law is in conformity with the standard of the ECtHR.⁶⁰ However, if the scope is extended to the indirect conveyance of religious ideas, for example by the attendance of the child at religious meetings, then the Dutch court's judgment about the attendance of the child at a church wedding ceremony is not in conformity with the *Vojnity* decision. This Dutch case did not refer to harm to the child with regard to attendance at the church ceremony, but to the statutorily guaranteed right of the mother with sole authority and having the daily care of the child to decide on this issue of freedom of religion.⁶¹ If one also takes into account that the ECtHR considers that the separated or divorced parent who does not have custody has no different position *per se* compared with married parents with regard to the communication and promotion of religious ideas, it is clear that a decision in such case would need a better justification after and according to a broad interpretation of the *Vojnity* decision. A more narrow interpretation of *Vojnity* renders the Dutch courts' decisions in parental religious disputes in conformity with the case law of the ECtHR.

5. Conclusion

The question we have examined in this article is: which factors are used in Dutch family law decisions and in the case law of the European Court of Human Rights to determine what the best interests of the child require in a case where parents disagree about religious issues in the upbringing of their child, and how are these factors assessed?

The factors used can be divided into factors used by the courts that are related and that are not related to religious issues on which the parents disagree. The factors which are related to the religious aspects of the case are stability (versus flexibility), social isolation (versus inclusion), the psychological well-being of the child and the child's actual and future choice. Furthermore, the factor of the risk of or actual physical harm is mentioned. All these factors indicate that the best interests of the child are pursued. That is obviously very important, but how do these factors relate to the freedom to determine the child's upbringing by the parent(s)? Placing the best interests of the child first can indeed mean that the state can seriously intervene in the upbringing freedom of the parents.

60 See the second case with regard to contact rights: District Court The Hague 9 July 2014, ECLI:NL:RBDHA:2014:9027.

61 See the first case about contact rights: District Court Zwolle 22 February 2001, KG 2001, 122.

It seems that the factor of social isolation, as explained by the ECtHR, can lead more readily to intervention by the state in the upbringing freedom of the parent who adheres to a minority religion. The risk of social isolation of children is after all mostly seen in the practices of that minority religion: does the religion limit participation in activities with others? In the Dutch interpretation of 'social isolation' the risk of social isolation lies with the acceptance of others who may or may not belong to the minority religion. This Dutch interpretation causes the factor of social isolation to be less likely to affect the upbringing freedom of a parent who adheres to a minority religion.

The decision of the ECtHR in *Ismailova* also shows that the actual enjoyment of the right of the child to freedom of religion can justify serious intervention by the state in the upbringing freedom of a parent. The factor of the psychological well-being of the child can have that same effect, especially when this well-being is considered to be threatened relatively easily. Therefore, the determining factors for the best interests of the child have an impact on the parents' freedom to determine the upbringing of their child. As these factors fall within the margin of appreciation of states, they have relative freedom to intervene. But it is not just the factors themselves, but also the way these factors are assessed: this can cause the secular state to have more or fewer limits to intervene in the private sphere of religious upbringing.

In this context the starting point of the jurisprudence of the ECtHR in *Hoffman* and *Palau Martinez* is extremely important: the secular state may not intervene in the religious upbringing on the basis of the religion itself or generalities pertaining to it. There must be direct and concrete evidence of the effects of the religious beliefs, practices or way of life of the parent on the daily life of the child. The objective collection and evaluation of the evidence remains a potential vulnerability, but arguments based on religion itself are not decisive. This makes state intervention more difficult.

Other elements of how to assess the determining factors of the best interests of the child also point in the direction of the requirement of a more hands-off attitude of the state with regards to parental religious upbringing: the recognition according to Dutch law that the parent with parental responsibility in principle has a say in the religious upbringing of the child, or the more recent requirement of the ECtHR of weighty reasons to justify interference with the direct conveyance of the religious view of a parent to the child and the requirement of exceptional circumstances for the complete removal of contact rights of a parent.

The manner in which the factors must be assessed thus gives some counterweight for the use by the state of the determining factors for the best interests of the child as a means to intervene (too) easily in the religious rights of parents. This is important, because the state can be more easily involved in religious parental disputes than when the parents agree on the religious upbringing.

With current immigration and globalization, many more cases are to be expected, both at the national and the international level. Then it should be possible to get a clearer picture of the limits both for parents and the state regarding religious issues. ■